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No. 99-554

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1999

GOODYEAR TIRE & RUBBER COMPANY AND NATHANIEL WILLIE JEFFERSON BROCK,

Petitioner,

v.

TERESA VINSON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The brief in opposition fails to engage the central issue raised in the petition — that petitioners' due process rights were violated when the Alabama Supreme Court retroactively applied a new and unforeseeable barrier to appellate review on a claim that was adequately preserved under then-existing law.

Inexplicably, respondent Vinson begins by contending (Opp. 3-4) that the petition attacks the Alabama trial system (including the post-trial process for reviewing jury awards of punitive damages) when, in fact, it is the action of the Alabama Supreme Court on appeal that forms the sole basis of the petition.

Vinson next asserts (Opp. 4-6) that no change in the appellate rules occurred here because petitioners simply failed to comply "with the long-standing rule that a party must make a record in the trial court in order to assert error on appeal," and that "alleged error must be raised in a post-trial motion to be preserved on appeal." Yet, this begs the question of what steps previously had to be taken in Alabama — or could reasonably have been understood by litigants as necessary — to "make a record"or to "raise[an issue] in a post-trial motion" in a situation in which the trial court clearly lacked any authority to grant the requested relief because of binding precedent that the party made unambiguously clear it intended to challenge on appeal.

As we noted (Pet. 15), what ***was*** well-established in Alabama at the time was a rule that parties need not undertake "a vain or useless act" as a precondition to appellate review, and it is difficult to envision anything more vain or useless than asking a trial court to overrule a state supreme court precedent — something that the trial court is statutorily prohibited from doing. See ALA. CODE § 12-3-16 (1975). Given those circumstances and that rule, petitioners reasonably chose to "make a record" on the statutory punitive cap issue by informing the trial court and respondent at every stage in the proceedings that they would be asserting the cap as a limitation on any punitive damages the jury might award, and by expressly stating their intention in their

post-trial papers to seek relief in the only forum in which they could obtain it — the Alabama Supreme Court.

Vinson also strains to show (Opp. 5-6) that none of the Alabama decisions cited by the petition had "excuse[d] a party from obtaining an adverse ruling in order to assert error on appeal." In fact, those cases uniformly demonstrate that Alabama had never previously required a party to have actually ***obtained*** a ruling from the trial court in order to preserve an issue for appeal. That was seen as a matter beyond the control of a litigant and was never supposed to be a prerequisite to an appeal. See Pet. 12. But more importantly, Vinson can point to no Alabama case prior to this one even suggesting that a party had formally to ask the trial court to disregard a binding precedent as a precondition to seeking the overruling of that decision on appeal to the proper court. That, indeed, is the natural consequence of the rule encouraging litigants to forgo "vain or useless" steps at the trial level in order to preserve appeal rights.

In trying to avoid the impact of this Court's due process decisions, Vinson asserts (Opp. 6-8) that Alabama was not constitutionally required to afford petitioners any right of appeal at all, as long as petitioners received a "full and fair trial" together with adequate post-trial review of the verdict. From this she concludes that it is of no moment whatever under the Fourteenth Amendment that petitioners may have been deprived in an arbitrary, capricious, and fundamentally unfair manner of their right to have the Alabama Supreme Court consider their claim to the benefit of the statutory punitive cap. This reasoning is gravely flawed: once Alabama chooses to put in place a process for appealing as of right, it may not depart arbitrarily from that process. See *Ohio Adult Parole Auth.* v. *Woodward*, 118 S. Ct. 1244, 1255 (1998) (Stevens, J., concurring in part and dissenting in part) ("Even if a State has no constitutional obligation to grant criminal defendants a right to appeal, when it does establish appellate courts, the procedures employed by those courts must satisfy the Due Process Clause."); *Evitts* v. *Lucey*,

469 U.S. 387, 405 (1985) (due process requires that, once the state has created a right of appeal, it must "offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal"). That is precisely what happened here, through the Alabama Supreme Court's mid-stream revision of the issue preservation rules. As a result, petitioners had no opportunity to have their probably meritorious challenge to *Henderson* heard.[1]

In addition, Vinson contends (Opp. 8) that petitioners should have asked the trial court to invalidate *Henderson* and then sought permission to take an interlocutory appeal pursuant to Ala. R. App. P. 5 when the trial court inevitably ruled against them. Given the fact that the ruling in this case concerning the appropriate amount of the punitive damages necessarily came as part of the order disposing of post-trial motions and setting the terms of the final judgment, petitioners would truly have had to have marched "through the looking glass" to have discerned that they were obligated to attempt to take an "interlocutory" appeal from the final judgment against them. Rule 5 was simply inapplicable on its face, and the suggestion that petitioners should have invoked it only added to the arbitrary and capricious nature of the Alabama Supreme Court's ruling.

Finally, Vinson asserts that it would be unfair to require the Alabama Supreme Court to consider the *Henderson* issue on the merits, because, she claims, she did not have an opportunity at the post-trial stage to "address the[] exceptions" to the cap and show "that this record would clearly have allowed the same verdict even if the cap had still been in place." Opp. 9. Her suggestion that this record would have supported a finding of actual malice or a finding of a "pattern" of wanton conduct – the

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[1] Vinson vainly attempts to downplay the interest of the members of the Alabama Supreme Court in revisiting *Henderson* at the time petitioners' appeal was heard (see Opp. 9), ignoring in so doing the explicit language of the special concurrences in this very case. See App. 2a, 3a, 11a, 12a.

only conceivably relevant exceptions to the statutory cap that petitioners invoked – is fanciful, given the minimal showing she made that petitioners were even wanton. Indeed, even in the Alabama Supreme Court where the issue of the cap was raised and exhaustively briefed by petitioners, Vinson did not mention the exceptions in any of her briefs (just as she did not mention any alleged waiver of the issue).

Of course, if the Alabama Supreme Court were to conclude that the proper application of the statutory cap is uncertain — a question of Alabama law — it would be entirely free to remand that issue to the trial court for further findings concerning the cap and its exceptions. But that is the most to which Vinson would be entitled if, notwithstanding the contrary ruling in *Henderson*, the cap is good law. She is not entitled to have petitioners' efforts to invoke the cap simply brushed aside by means of the arbitrary, unpredictable, and fundamentally unfair procedure employed below.[2]

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[2] Vinson calls attention (Opp. 9) to the fact that, since the decision below, the level of the statutory cap has been ***prospectively*** increased. Because the new cap statute does not apply to this case — but, if *Henderson* were overruled, the one invoked by petitioners would — it is hard to see the relevance of Vinson's point. In any event, the federal constitutional question raised by the petition has nothing to do with how large the statutory cap should be, or what exceptions it does or should contain, but is solely concerned with whether petitioners were unconstitutionally deprived of their right to have a legal issue considered on appeal by a newly-created, unforeseeable procedural obstacle.

CONCLUSION

The petition for a writ of certiorari should be granted. The judgment of the Alabama Supreme Court should be vacated, and the case should be remanded for that court to consider and determine petitioners' substantial legal challenge to *Henderson*.

Respectfully submitted.

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